No. 76-6767

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK R. SCOTT AND BERNIS L. THURMON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, Jr.,
Solicitor General,
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OPINIONS BELOW

The initial opinion of the district court (A. 1–24) is reported at 331 F. Supp. 233. The first opinion of the court of appeals (A. 27–34) is reported at 504 F. 2d 194. The district court's findings and conclusions on remand (A. 35–39) are unreported. The second opinion of the court of appeals (A. 40–53) is reported at 516 F. 2d 751, and the order of the court of appeals denying rehearing *en banc* (together with a dissenting opinion) (A. 54–57) is reported at 522 F. 2d 1333. The opinion of the court of appeals affirming petitioner's convictions (Pet. App. H) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. H) was entered on March 29, 1977. The Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 28, 1977. The petition was filed on May 19, 1977, and was granted on October 11, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the interceptions of wire communications in this case complied with the minimization requirements of the judicial orders authorizing the interceptions.

2. Whether the proper remedy for a failure of the monitoring agents to obey the minimization requirement of the order with respect to some conversations is the suppression of all intercepted conversations, including those that were properly intercepted.

3. Whether petitioner Scott, who was not an occupant of the premises in which the target telephone was located and all of whose conversations over that telephone were properly intercepted, has standing to contend that the agents violated the authorization orders in failing to minimize the interception of other conversations, to which he was not a party.

STATUTES INVOLVED

18 U.S.C. 2518(5) provides in pertinent part:

> * * * Every order [entered under this section] and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

18 U.S.C. 2518(10)(a) provides in pertinent part:

> Any aggrieved person in any trial, hearing, or proceedings in or before any court * * * of the United States * * * may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> * * * * * *

18 U.S.C. 2510(11) provides:

> "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

STATEMENT

Following a non-jury trial on stipulated facts in the United States District Court for the District of Columbia, petitioner Scott was convicted of selling and purchasing narcotics not in the original stamped package, in violation of 26 U.S.C. (1964 ed.) 4704(a), and petitioner Thurmon was convicted of conspiracy to sell narcotics, in violation of 26 U.S.C. (1964 ed.) 7237(b) and 4705(a). Each was sentenced to ten years' imprisonment. The court of appeals affirmed (Pet. App. H).

1. THE INTERCEPT ORDERS

The evidence on which petitioners were convicted was derived from interceptions of telephone conversations in January and February 1970 under a court order issued on January 24, 1970, by United States District Judge John Lewis Smith, Jr., pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510–2520), and under an extension of that order issued on February 13, 1970. Judge Smith issued the initial order on the basis of an application by Assistant United States Attorney Harold Sullivan and an accompanying affidavit by Special Agent Glennon Cooper of the Bureau

of Narcotics and Dangerous Drugs ("BNDD") (A. 66–78) demonstrating probable cause to believe that nine named targets of the proposed interceptions, including petitioners, were participating in a conspiracy to import and distribute narcotics in the Washington, D.C., area. The affidavit also set forth reasons to believe that the conspiracy was utilizing a certain residential telephone listed to Geneva Thornton and that petitioner Thurmon, also known as Benjamin Thornton, had taken an order for a large quantity of narcotics on that telephone (A. 77).

On the basis of the application and affidavit, the court found probable cause to believe that a telephone listed in the name of Geneva Thornton (hereinafter "Geneva Jenkins") and located at 1425 N Street, N.W., Washington, D.C., was being used in the conspiracy (A. 79–80, 118–120).[1] The court also found probable cause to believe that the interception of wire communications over the target telephone would "concern the date and the manner in which narcotic drugs will be smuggled into the United States and the participants and the nature of the conspiracy involved therein and the illicit destination of these narcotic drugs in this jurisdiction" (A. 79–80).

Accordingly, the Court issued an order on January 24, 1970, under 18 U.S.C. 2518 authorizing special agents of the BNDD to intercept wire communica-

[1] "Geneva Thornton" was an alias used by Geneva Jenkins, who resided with petitioner Thurmon at the N Street premises during the period of the interceptions and was a co-defendant in this case (A. 2–8).

tions of petitioner Thurmon, co-conspirator Alphonso H. Lee,[2] "and other persons as may make use of the [target telephone]" (A. 80).

The order further provided, as required by Section 2518(5) (*ibid.*):

> [T]his authorization to intercept wire communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications that are [not] otherwise subject to interception under chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objectives, or, in any event at the end of thirty (30) days from date.[3]

The order directed Assistant United States Attorney Sullivan to provide a report to the court every five days detailing "the progress of the interception and the nature of the communication intercepted" (*ibid.*). On February 13, 1970, the court issued an 11-day extension order on the basis of a second application and affidavit (A. 100–117). The extension order also contained provisions for progress reports, termination, and minimization (A. 119-120).[4]

[2] Lee was subsequently indicted and convicted together with petitioners. His appeal is now pending in the court of appeals (No. 77–1092).

[3] The order inadvertently omitted the word "not," but the agents understood the order's intent (A. 18, n. 1). The order also inadvertently specified a 30-day period, but the agents understood it to mean 20 days, the period sought in the application (A. 18, n. 2).

[4] Between February 4 and February 24, 1970, pursuant to judicial orders, government agents intercepted conversations of the conspirators over two other telephones, located at 5195 Linnean Terrace, N.W., in Washington, D.C. The record contains no evidence concerning the manner in which these interceptions were conducted, and they are not at issue here (A. 95–97).

2. THE INTERCEPTIONS

Between January 24 and February 24, 1970, the monitoring agents listened to and tape recorded in their entirety 384 telephone calls, which constituted virtually all of the incoming and outgoing calls made over the target telephone during that period (A. 21, 145).[5] Either petitioner Thurmon or Geneva Jenkins was a party to every intercepted call.[6]

The nature of the intercepted calls and the manner in which the agents conducted the interception were subsequently described in some detail during two hearings on motions to suppress the calls, discussed below at pp. 8–12, 14–16.

Every five days during the interception, Mr. Sullivan submitted progress reports to Judge Smith that set forth, *inter alia*, the total number of calls intercepted and recorded during the period and the number of those calls that were identified as narcotics related (A. 81–83, 98–99, 121, 124). Those reports reflect that approximately 40 percent of the calls inter-

[5] At one point during this period the agents ceased the interceptions when they realized that telephone company personnel had connected the monitoring equipment to the wrong line (A. 132). Any calls made over the target telephone during that time were, of course, not intercepted.

[6] That fact is revealed in this transcripts of the calls (hereinafter designated as "I. Tr."), which were introduced in the suppression hearings and are part of the record in this case.

cepted were described in the reports as involving narcotics transactions (*ibid.*).

On the basis of the evidence developed by the interceptions, 22 persons were arrested and considerable quantities of narcotics were seized. Eventually, 14 persons, including petitioners and Geneva Jenkins, were indicted for substantive narcotics offenses and for conspiracy to commit those offenses (A. 1-2, 28).

3. THE DISTRICT COURT'S 1971 SUPPRESSION ORDER

Petitioners and the other defendants moved to suppress all of the intercepted conversations on a number of grounds, including the ground that the agents had failed to comply with the minimization requirement of the interception orders. A hearing was held on those motions before United States District Judge Waddy. Agent Cooper, the agent who supervised the interceptions, was the only witness who testified on the minimization issue.

Agent Cooper testified that he understood the interception orders "to restrict us to conversation relating to narcotics" and that he "relayed [those] instructions to the agents who would be manning the intercept" (A. 125). Agent Cooper testified that "[a]s it turned out the conversations, nearly all the conversations were recorded," but he denied the contention that the agents "did nothing in fact to limit * * * their overhearing of the conversations" or that the agents were "instructed to monitor all conversations" (A. 126). He stated, for example, that the agents were instructed not to monitor certain types

of privileged conversations, such as attorney-client, doctor-patient, or priest-penitent conversations (A. 126, 130).

With respect to other types of conversations, the monitoring agents' general approach and the problems they faced were described in the following colloquies (1971 Tr. 306–307):

> THE COURT: At this point let me inquire of you: There was some statement made in this hearing that often these conversations would begin with normal weather, family discussion etc. and then at the end of the conversation coded words would be used to identify that narcotics were being discussed in the conversation. Now, is that the way it was handled?
>
> [COOPER]: That is correct, sir, There were conversations of this type and the agents were aware of this probability.
>
> * * * * *
>
> THE COURT: Following up my last question, did the agents who manned these telephones know [at] the time that they were placed there that this type of condition would exist?
>
> [COOPER]: Yes, they did.

Agent Cooper testified that those difficulties made it necessary for the agents to monitor at least a portion of each conversation to determine its nature and thus to determine whether it was properly subject to interception. As he explained (1971 Tr. 309):

> The call was to be taken, was to be listened to, in order to determine several things, who was speaking, to whom, is it an individual that

> we had heard before, is it an individual that we have heard ordering narcotics, is it a principal in the case, is it an attorney, is it a doctor, what is the substance of the call—there were many things that we had to rely on. There was an extreme amount of coded language used and by this I mean improper terms were used—correct terms were not used to identify objects of contraband. It was up to the agent to sit and listen and to determine just what type of conversation he was listening to.

Agent Cooper also testified that he conferred with and relied to some extent on the advice of Assistant United States Attorney Sullivan in determining the types of calls that should not be intercepted (1971 Tr. 308–310), but that the monitoring agents conducted the interception on the understanding that they were to terminate the interception of any particular conversation if and when they determined that it was not properly interceptable. Thus, he stated that "[the interception] would have been shut off at the time the agent knew in his mind what the subject of the conversation was" (1971 Tr. 359). By way of illustration, Agent Cooper referred to another interception operation in which he had recently participated, which was conducted on the same basis. There the agents learned after monitoring several conversations that one user of the telephone typically discussed her illness with the particular friend, and accordingly the agents would shut off the interception whenever those two individuals came on the line (1971 Tr. 410–414). With respect to the interception in this case, however, when Agent Cooper was

asked whether he could "point to any discretion exercised by any agent at any time that resulted in the non-recordation * * * as to what was overheard," he responded that he could not (A. 131).

Agent Cooper was questioned at some length about certain intercepted calls, particularly 27 calls to obtain recorded time and weather information and seven conversations between Geneva Jenkins and her mother. He testified the time and weather calls were intercepted so that "[i]n the event that once it was terminated and another call was placed quickly thereafter, we would be that close" (A. 131). With respect to the conversations between Geneva Jenkins and her mother, Agent Cooper testified that while the agents had no information that the mother was involved in the conspiracy, they had some basis for believing she was aware of it (1971 Tr. 428–429; see also 1971 Tr. 349–351).[1]

After the hearing, Judge Waddy granted the defendants' suppression motions on the ground that the agents had failed to comply with the minimization requirements in Judge Smith's orders (A. 19–23). He concluded that they had failed to comply because virtually all conversations were intercepted, because "approximately 60% of the calls intercepted were

---

[1] In one conversation, Geneva Jenkins told her mother that petitioner Thurmon was "out taking care of his business now" (A. 150). In another conversation, Geneva's mother said, "I got somethin to tell you I ain't gonna tell on no phone because you ain't suppose talk business on the phone" (A. 151). Another conversation referred to Alfonso Lee, one of the principals in the conspiracy (A. 150–151).

completely unrelated to narcotics," because "the record clearly depicts certain communications that could not possibly involve drugs," and because "[t]he record is devoid of any attempt, no matter how slight, to minimize the interception of unauthorized calls" (A. 21).

The government moved for reconsideration on the basis of an analysis of the transcripts of the calls prepared after the suppression hearing, which suggested that it was reasonable and consistent with the interception orders for the agents to have intercepted all but six of the 384 calls (A. 145–162).[8] The analysis classified 32.8 percent of the conversations as "in substance relate[d] to the narcotics enterprise," another 36.9 percent as so ambiguous that their purpose could not be determined, and another 14.3 percent as ones that could have been intercepted with a reasonable expectation that they would contain pertinent narcotics-related material.[9] The district court denied the motion without opinion on June 25, 1971 (A. 25–26).

[8] The call analysis was prepared by Assistant United States Attorney Phillip Kellogg, and the categories of calls were devised by him.

[9] The analysis divided the remaining conversations (16 percent of the total) into those related to narcotics in part (1.8 percent); those not directly related to narcotics but nonetheless of important evidentiary value (5.4 percent); recorded messages (7 percent); and conversations that could not have been intercepted with a reasonable expectation that they would contain pertinent materials (1.56 percent).

4. THE COURT OF APPEALS' 1974 DECISION

The government appealed under 18 U.S.C. 3731, and in June 1974[10] the court of appeals vacated the suppression order and remanded the case for an assessment of the reasonableness of the monitoring agents' conduct "on a considerably more particularized basis" than that made by the district court (A. 32, 34). The court ruled that the fact that 60 percent of the intercepted conversations "may appear in retrospect" to have been unrelated to narcotics did not necessarily mean that the interceptions were unreasonable (A. 33). Noting that "a substantial number of the intercepted conversations that cannot be classified as narcotics-related appear to have been either very short in duration or extremely ambiguous in nature, or both," and that the interception of such conversations "cannot be considered unreasonable, for the agents could not have determined whether they were innocent prior to their

[10] The court of appeals deferred its decision pending its disposition of the already pending appeal in *United States* v. *James*, 494 F. 2d 1007 (C.A. D.C.), certiorari denied *sub nom. Tantillo* v. *United States*, 419 U.S. 1020, which also presented a minimization issue in a case where, as here, virtually all of the calls made were intercepted.

[11] In concluding that the agents in that case had not violated the minimization requirements, the court in *James* listed several factors that should be weighed in judging compliance with the minimization requirement, including (a) the scope of the criminal enterprise involved, (b) the extent to which the monitored telephone was being utilized in the illicit activity, (c) the government's expectation as to the contents of the calls, and (d) the extent of judicial supervision exercised over the execution of the interception (494 F. 2d at 1019–1021).

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termination" (A. 32), the court concluded that the 60 percent figure relied upon by the district court "substantially overstates the case for noncompliance with the order to minimize" (*ibid.*). It therefore directed the district court (*id.* at 33–34) to "accept the [government's] call analysis and any other evidence that might appear to be of assistance in the resolution of this complicated minimization question" and to reassess the reasonableness of the agents' conduct in light of the court of appeals' intervening decision in *United States* v. *James*, 494 F. 2d 1007 (C.A. D.C.) certiorari denied *sub nom. Tantillo* v. *United States*, 419 U.S. 1020.[11]

5. THE REMAND PROCEEDINGS IN THE DISTRICT COURT

On remand the district court held a second suppression hearing, at which Agent Cooper and Assistant United States Attorney Kellogg testified. Agent Cooper reiterated his 1971 description of the way in

[11] The court of appeals rejected the government's contention that only Jenkins and petitioner Thurmon were "aggrieved persons" with standing under the statute (18 U.S.C. 2510(11)) to challenge the agents' alleged failure to minimize because the other defendants, including petitioner Scott, were not parties to any intercepted conversation that should not have been intercepted (A. 30–31). The court stated, however, that the government's argument was "correct" that a person would have no standing to urge suppression of a conversation in which he did not participate (A. 30–31, n. 5). The court found it unnecessary to decide the government's further contention (see Part II, *infra*) that the statute does not require suppression of conversations that were properly intercepted, but only of conversations that should not have been intercepted (*ibid.*).

which the agents had conducted the interception.[12] He also testified regarding his state of mind at the time of the interception, stating that there seemed to him to be two types of calls—those that were clearly narcotics related and those that were ambiguous (1974 Tr. 100). He indicated that the five-day reports to Judge Smith reflected his assessment at the time of the percentage of intercepted calls that were clearly narcotics related, but said that they did not reflect any conclusion by him that the other intercepted calls were clearly unrelated to narcotics (1974 Tr. 100–103). He also stated that the interception led the agents to realize that the operation involved many more people than they had originally believed, although it appeared to involve primarily local distribution of narcotics rather than importation from other states (A. 165).

Kellogg testified about the analysis of the calls that he had prepared, which divided the calls into various categories. He acknowledged that the monitoring agents themselves had not devised those categories and indicated that the analysis was simply an attempt to demonstrate the reasonableness of the agents' conduct (see, *e.g.*, A. 176; 1974 Tr. 384).

[12] Thus he again testified that the agents were aware that the orders required them to minimize nonpertinent calls and that they were never instructed to the contrary (1974 Tr. 92, 97, 126). He again stated that the agents could only determine by experience and after learning patterns of calls whether a particular call was likely to be "totally out of the realm of the purpose for which we were suppose[d] to be on the line" (*id.* at 94–96). He also testified that the agents had reasons to believe that the calls between Geneva Jenkins and her mother might shed light on the narcotics operation (*id.* at 87–88).

The district court again ordered all of the intercepted conversations suppressed (A. 35–39). The court did not find any errors in the government's call analysis, but it rejected it as having no bearing on the reasonableness of the actual conduct of the surveillance because, in the court's view, the analysis constituted "an after-the-fact non-validated presentation of counsel for the Government [which] does not and was not intended to establish that the monitoring agents complied with the minimization statute and order" (A. 38–39). On the basis of its finding that "the monitoring agents made no attempt to comply with the minimization order" (A. 36), the court concluded that the agents' "conduct would be unreasonable even if every intercepted call were narcotic-related" (A. 39).[13]

6. THE 1975 COURT OF APPEALS DECISION

The court of appeals again reversed (A. 40–55). The court reasoned that 18 U.S.C. 2518(5), which specifies that judicial orders authorizing interceptions are to require that they "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception," did not con-

[13] The district court did not discuss the standing of certain defendants to challenge the alleged failure to minimize or the government's contention that any failure to minimize requires only the suppression of conversations that should not have been intercepted. It stated only that "[f]ailure to comply with the Statute and order of the Court renders any evidence obtained by such failure suppressible. *Sabbath* v. *United States*, 391 U.S. 585" (A. 39).

template an absolute bar to the interception of such conversations, but rather imposed a standard of reasonableness, compliance with which could only be determined from the facts of each case (A. 43–46). The court further stated (A. 46) (footnote omitted):

> The trial court's error here lies in focusing on the reasonableness of the agents' intent rather than on the reasonableness of the particular interceptions which took place. The subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure. For example, the agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable. On the other hand, even if the agents make their best efforts to comply, the ultimate interceptions may prove to be so unreasonable that suppression is necessary. The presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied, but the decision on the suppression motion must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions.

Undertaking its own review of the intercepted conversations, the court of appeals determined that approximately 40 percent were clearly narcotics-related and thus properly subject to interception under the order (A. 47). Of the remaining 60 percent, the court

found that "many were of very short duration and were terminated before their relevance could be determined," "[o]thers were extremely ambiguous in nature and possibly involved the use of codes to mask their true purpose," and "many were one-time conversations which afforded the monitoring agents no opportunity to develop a category of innocent calls whose interception should be minimized" (A. 47–48). The court identified only the seven calls between Geneva Jenkins and her mother "as potentially subject to a minimization requirement" (A. 48), but it concluded that their interception was not unreasonable since they contained references that could reasonably have led the agents to believe that the conversations might be pertinent to the narcotics conspiracy under investigation (A. 49). Having found "no category of conversation which would have required the institution of a minimization procedure by the monitoring agents" (*ibid.*), the court held that the interceptions were reasonable and did not violate the interception orders.[14] The court denied petitions for re-

[14] The court also concluded that the extent of the surveillance was not unreasonable under the standards established by its decision in *United States* v. *James*, *supra* (A. 49–52). With respect to Judge Smith's supervision of the wiretaps, the court noted that in view of the five-day reports submitted to him, the "judge was aware of the number of irrelevant conversations which were being intercepted and could have modified the wiretap authorization had he believed that any such action was appropriate" (A. 51). While the court found "no deficiency in the judge's supervision" (*ibid.*), it went on to state: "However, in issuing orders under 18 U.S.C. § 2518 in the future, courts should include a provision requiring that periodic reports to the supervising judge specifically include statements on attempts to minimize" (A. 51–52).

hearing *en banc* (A. 54), and this Court denied a petition for a writ of certiorari, 425 U.S. 917 (A. 57).

7. THE TRIAL AND APPEAL

On remand to the district court, petitioners were tried and convicted on stipulated evidence consisting primarily of their intercepted conversations, which directly implicated them in the narcotics enterprise. The court of appeals affirmed the convictions (Pet. App. H).

SUMMARY OF ARGUMENT

I

1. Petitioners' principal contention appears to be that even though the monitoring agents could reasonably have intercepted every communication in full without violating the minimization requirements of the statute and the interception orders, the agents nevertheless violated those requirements because, petitioners allege, they subjectively intended to intercept every call without regard to those requirements.

Petitioners' argument proceeds from a legally unsound premise because, as the court of appeals correctly held, objective reasonableness, not subjective intent, is the proper legal standard for determining whether agents have complied with the minimization requirements of interception orders issued under Title III.

The minimization requirements of 18 U.S.C. 2518 (5) do not absolutely preclude any interception of non-pertinent communications, but rather impose a standard of reasonableness on agents conducting interceptions. The few statements of this Court on the

matter and the overwhelming weight of court of appeals' decisions establish that, for reasons of both justice and practicality, the reasonableness of a search or seizure depends on an objective assessment of the facts confronting the police at the time and not the officers' subjective motives.

Petitioners' reliance on cases explicating the deterrent policies of the exclusionary rule to support their claim that subjective motives must govern the lawfulness of actions fails to distinguish between what is necessary in the first instance to establish a constitutional or statutory violation and what is necessary to warrant the imposition of an exclusionary sanction. Decisions of this Court have recognized that, in view of the deterrent purposes of the exclusionary rule, considerations of official motives may in some cases militate against the application of an exclusionary sanction even though a constitutional or statutory violation has been established. *E.g., United States* v. *Janis,* 428 U.S. 433; *United States* v. *Calandra,* 414 U.S. 338. But neither those decisions nor other decisions of this Court support petitioners' contention that improper official motives alone can establish the violation in the first instance.

2. Petitioners' argument also proceeds from the erroneous factual assumption, unsupported by the record, that the agents harbored a subjective intent to act unreasonably or to disregard minimization requirements. Only by taking certain testimony of Agent Cooper out of context and by drawing illogical inferences from the fact that all conversations were

intercepted and from the interim reports made during the interceptions is it possible to conclude that there was any intent to ignore minimization requirements. In fact, the undisputed testimony of Agent Cooper shows that the agents did intend to respect their minimization obligations if the occasion to minimize had arisen.

3. Petitioners do not directly dispute the objective reasonableness of any interception in this case, and their argument makes no reference to particular interceptions. To the extent their argument could be read as disputing the objective reasonableness of the overall interception, it is erroneous.

The court of appeals correctly concluded that several factors in this case demonstrate the reasonableness of the interceptions. First, preliminary information available to the agents, confirmed during the course of the interception, indicated that the criminal enterprise under investigation was large. Second, either petitioner Thurmon or Geneva Jenkins, both known members of the conspiracy, was a party to every intercepted call. Third, many of the conversations used coded language, were otherwise ambiguous, or were too short to permit the agents to make any judgment about their likely content. Fourth, even with respect to the conversations that, in retrospect, appear to have been wholly innocent, that they would be so was not evident while they were being intercepted. Finally, the interceptions were conducted under reasonably close judicial supervision.

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II

If the Court accepts neither our contention that the agents did not violate minimization requirements nor petitioners' broad theory that the agents' allegedly unlawful subjective intent taints the interception of every conversation, but concludes that some conversations were properly intercepted and some conversations were not, Section 2518, general exclusionary rule principles, and the clear weight of decisional authority indicate that suppression is required only with respect to those conversations that were not properly intercepted. Petitioners' claim that suppression only of improperly intercepted calls would not provide adequate deterrence is contrary to this Court's analysis of the policies and proper application of the exclusionary rule. Moreover, Title III contains specific statutory remedies that are better designed to curb excessive interceptions than the wholesale exclusion of all communications, properly as well as improperly intercepted.

III

Petitioner Scott, who has never contended that he was a party to innocent conversations that could not reasonably have been intercepted, has no standing to claim, as a basis for suppressing his own intercepted conversations, that the agents violated minimization requirements when they intercepted the communications of other persons.

ARGUMENT

I

THE INTERCEPTIONS OF WIRE COMMUNICATIONS IN THIS CASE COMPLIED WITH THE MINIMIZATION REQUIREMENTS OF THE ORDERS

Petitioners' contentions with respect to the first issue presented in their petition and brief are not entirely clear. From their statement of the issue (Br. 4) and their argument on it (Br. 19), petitioners appear to be contending that even though the agents could reasonably have intercepted every conversation without violating the statute or the interceptions orders, they nevertheless violated the statute and the orders because they subjectively intended to intercept every call without regard to the minimization requirements—that is, if there had been calls they should not have intercepted, they would have intercepted them anyway. That argument warrants two preliminary observations.

First, the argument based on subjective intent does not dispute—indeed it assumes—that each individual call could have been reasonably intercepted. In fact, petitioners do not challenge the government's call analysis or the court of appeals' independent analysis of the calls; their argument simply makes no reference to any specific calls or categories of calls.

Second, the argument proceeds from several factual suppositions that are not supported by the record. For example, the argument assumes that the

agents subjectively intended to intercept every call without regard to the minimization requirements of Judge Smith's orders. It also assumes that the agents, while they were conducting the interceptions, concluded that 60 percent of the calls were not crime related but intercepted them nevertheless. Both those assumptions, as we show in Part I(B), *infra*, are contrary to the record.

Although petitioners do not point to any specific call or group of calls to establish a failure to minimize on the part of the monitoring agents, they also appear to argue, as an alternative to their claim that all of the interceptions were tainted by the agents' allegedly improper subjective intent, that the interception as a whole was objectively unreasonable when assessed in light of various standards established by the court of appeals (Br. 25–29). That argument does not focus on the calls themselves but on other circumstances, such as the scope of the criminal conspiracy, the location of the telephone, and the degree of judicial supervision of the interception.

To respond to all of the issues potentially raised by petitioners' arguments on the first question presented, we will argue (1) that objective reasonableness is the proper standard for determining whether agents have complied with the minimization requirement of orders issued under 18 U.S.C. 2518; (2) that the record does not in any event establish that the agents in this case subjectively intended to violate the minimization requirements of the orders; and (3) that the record establishes that the interceptions complied with the

statute and the interception orders issued pursuant to it.

A. THE COURT OF APPEALS CORRECTLY HELD THAT OBJECTIVE REASONABLENESS IS THE PROPER STANDARD FOR DETERMINING WHETHER AGENTS HAVE COMPLIED WITH THE MINIMIZATION REQUIREMENTS OF WIRE INTERCEPTON ORDERS

Assuming *arguendo* that the agents in this case subjectively intended to intercept all conversations and to disregard the requirement that they minimize interceptions of non-pertinent conversations (but see Part I(B), *infra*, pp. 34–39), there nevertheless was no violation of Section 2518(5) or the interception orders unless an objective assessment of their conduct reveals a failure to minimize.

Section 2518(5) provides that a judicial order authorizing the interception of wire communications is to contain a requirement that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." Section 2518(10)(a)(iii) authorizes any "aggrieved person" to move to suppress any intercepted conversation on the ground that "the interception was not made in conformity with the order of authorization or approval." [15] On its face, the statute does not directly

[15] The statute does not directly impose a minimization requirement on agents conducting an interception, but imposes that requirement through judicial orders issued under the statute. Petitioners' suppression motions were therefore not based on Section 2518(10)(a)(i) or (a)(ii), which authorizes suppression when the "communication was unlawfully intercepted" or when the "order of authorization * * * is insufficient on its face," but on Section 2518(10)(a)(iii).

prohibit the interception of non-relevant communications or require the suppression of such conversations; as the court of appeals noted (A. 43), the use of the word "minimize" reflects that Congress contemplated that some non-relevant conversations would inevitably be intercepted. Rather, as its language and legislative history indicate, Section 2518(5) was meant to impose a requirement of reasonableness in executing the judicially authorized search similar to the requirement generally imposed by the Fourth Amendment.[16] And the use of the word "conducted" in the minimization provision of the statute confirms that the focus is properly on the agents' actions and not on their thoughts.

Petitioners proceed on a legally erroneous premise in contending that the interceptions in this case, even if objectively reasonable when assessed in light of the facts and circumstances existing at the time, were nevertheless unlawful if the agents subjectively intended to intercept all communications in their entirety. None of the cases cited by petitioners (Br. 22–23) supports their contention; indeed, those citations indicate that petitioners have failed to distinguish between what is necessary to establish a statutory or constitutional violation and what is necessary to support a suppression remedy once a violation has been established (see pp. 32–34, *infra*).

The question whether an individual has complied with or violated a legal requirement of reasonable-

[16] See S. Rep. No. 1097, 90th Cong., 2d Sess. 101, 103 (1968); *United States* v. *James*, *supra*, 494 F. 2d at 1018.

ness—in the context of the Fourth Amendment, Section 2518, or any other rule of law—has always and of necessity turned upon an objective assessment of his actions in light of the facts and circumstances confronting him at the time. At least in Anglo-American jurisprudence, subjective intent alone does not make otherwise lawful conduct illegal or unconstitutional.[17] An example from the law of search and seizure will illustrate the point: suppose a police officer sets out to arrest an individual whom he has no reason to suspect of having committed a crime, but finds that individual in the act of committing a crime and arrests him. It is clear that the arrest would not be unreasonable or unconstitutional merely because of the officer's subjective intent to make an arrest regardless of the circumstances. If the arrest is in fact reasonable under the circumstances, the individual's constitutional or statutory rights against unreasonable arrest have not been infringed. Conversely, if the facts known to the officer at the time of the arrest, objectively viewed, did not give rise to probable cause, the arrest is unlawful even if the officer subjectively believed otherwise.

[17] Of course subjective intent to do a prohibited act is often a necessary element of responsibility for that act, and except in a small category of cases is always a necessary element of criminal culpability. But it is never a sufficient element by itself; every violation of law also requires commission of an unlawful act. Moreover, improper subjective intent is not a necessary element of a Fourth Amendment violation; a policeman may violate the Fourth Amendment even though he subjectively believes that his conduct is reasonable or supported by probable cause. See *Terry* v. *Ohio*, 392 U.S. 1, 21–22.

The question of the selection of a criterion—objective or subjective—for evaluating the reasonableness of a search under the Fourth Amendment is not one that this Court appears to have explored at length in any of its decisions. There are, however, strong indications in several cases that an objective standard is to be applied, and that view is supported by the great weight of court of appeals' decisions. The question was addressed by the Court in *Terry* v. *Ohio,* 392 U.S. 1, 21–22 (footnote omitted). In discussing how to assess the reasonableness of a stop and frisk, the Court stated:

> [I]t is imperative that the facts be judged against an objective standard * * *. * * * [S]imple "'good faith on the part of the arresting officer is not enough.' * * * If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck* v. *Ohio,* [379 U.S. 89] at 97.

See also *Henry* v. *United States,* 361 U.S. 98; Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 373 (1974).

And in *United States* v. *Robinson,* 414 U.S. 218, the Court upheld the search of an arrestee incident to a lawful arrest against a claim that the motivation for the search exceeded the legal justification for the search-incident exception, stating (*id.* at 236): "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [Officer] Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed."

With virtual unanimity, the courts of appeals have followed those principles and have assessed searches or seizures by their objective reasonableness, without regard to the alleged subjective motive of the officers involved. For example, in *United States* v. *Bugarin-Casas,* 484 F. 2d 853, 854, n. 1 (C.A. 9), certiorari denied, 414 U.S. 1136, the court observed that "[t]he fact that the agents were intending at the time they stopped the car to search it in any event * * * does not render the search, supported by independent probable cause, invalid." [18]

Our research has disclosed only two court of appeals decisions that may be viewed as having determined the issue of Fourth Amendment compliance on the basis of the officers' subjective motives, although the

[18] See also, *e.g.*, *United States* v. *Stratton,* 453 F. 2d 36 (C.A. 8), certiorari denied, 405 U.S. 1069; *White* v. *United States,* 448 F. 2d 250, 254 (C.A. 8); *Dodd* v. *Beto,* 435 F. 2d 868, 870 (C.A. 5); *Klingler* v. *United States,* 409 F. 2d 299, 304 (C.A. 8), certiorari denied, 396 U.S. 859; *Smith* v. *United States,* 402 F. 2d 771 (C.A. 9); *Greene* v. *United States,* 386 F. 2d 953, 956 (C.A. 10); *Sirimarco* v. *United States,* 315 F. 2d 699, 702 (C.A. 10), certiorari denied, 374 U.S. 807; cf. *United States* v. *Welsch,* 446 F. 2d 220 (C.A. 10); *United States* v. *Lee,* 308 F. 2d 715 (C.A. 4). With respect to a related issue, courts that have considered the question have generally concluded that whether or not an individual has been arrested or placed in custody depends on an objective assessment of the circumstances and not upon whether the officers subjectively intended to prohibit the individual from leaving if he had tried. See *Lowe* v. *United States,* 407 F. 2d 1391, 1397 (C.A. 9); *Allen* v. *United States,* 390 F. 2d 476, 479 (C.A. D.C.); *Williams* v. *United States,* 381 F. 2d 20, 22 (C.A. 9); *People* v. *Arnold,* 66 Cal. 2d 438, 449, 426 P. 2d 515, 522.

issue was not analyzed in the opinions.[19] However, in one of those cases, *Commonwealth of Massachusetts* v. *Painten*, 368 F. 2d 142 (C.A. 1), in which this Court dismissed the petition for a writ of certiorari on the ground that the record was not sufficiently clear on the issue, 389 U.S. 560, 561, Mr. Justice White stated what we believe to be the correct view in his dissent from the dismissal:

> The position of the courts below must rest on a view that a policeman's intention to offend the Constitution if he can achieve his goal in no other way [can] contaminate all of his later behavior. * * * That such a rule makes no sense is apparent * * *. We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements. In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.

389 U.S. at 564–565; see also *id.* at 562 (Fortas, J. concurring).

[19] *United States* v. *Cooks*, 493 F. 2d 668 (C.A. 7), certiorari denied, 420 U.S. 996; *Commonwealth of Massachusetts* v. *Painten*, 368 F. 2d 142 (C.A. 1), certiorari dismissed as improvidently granted, 389 U.S. 560. Contrary results in similar circumstances were reached in *United States* v. *Welch*, *supra*; *Sirimarco* v. *United States*, *supra*; and *United States* v. *Lee*, *supra*.

The focus of the courts on actions rather than thoughts reflects considerations both of justice and practicality. As the Court noted in *Terry*, an individual's right to be free from unreasonable official invasions of privacy are best secured by considering whether or not the invasion is justified by the facts and circumstances known to the officer. Moreover, as Mr. Justice White indicated in *Painten*, it would make little sense to conclude that when two officers, each possessing facts sufficient to support probable cause to arrest an individual, make an arrest, the Fourth Amendment rights of the individual have been violated by one officer because he intended to make the arrest regardless of probable cause, yet have not been violated by the same action on the part of the other officer, if the latter harbored no such purpose.

The practical considerations include the difficulty to which Mr. Justice White alluded of reliably ascertaining subjective intent (something we hereafter contend the district court failed to do in the instant case), particularly in the absence of objective facts evidencing illegality. Where the action in question (here, intercepting conversations) is the product of human decision made in relation to particular existing circumstances, it is rarely possible to conclude with assurance what decision would have been made in other circumstances.

Petitioners, however, argue (Br. 22–24) that the agents' subjective intent rather than an objective analysis of the facts must determine the legality of their actions because of the established principle that

a search may not be justified by what it ultimately discloses. That argument misconceives the nature of the analysis of the calls performed by the government and the court of appeals. That analysis examined the very conversations to which the agents were listening, and its conclusion—that the agents acted reasonably in listening to all but a *de minimus* number of calls—did not rest upon what the interceptions ultimately disclosed, but upon the reasonableness of the act of listening in view of the nature of the conversations being overheard.[20]

In support of their claim that the monitoring agents' compliance with the minimization requirement of the interception orders must be measured by their subjective intent, petitioners also rely (Br. 22) on decisions of this Court establishing that the principal purpose of the exclusionary rule is to deter police misconduct. *E.g., United States* v. *Calandra,* 414 U.S. 338, 347. Those decisions are inapposite. Petitioners apparently have failed to distinguish between what is necessary in the first instance to show a violation of constitutional or statutory requirements concerning searches and seizures and what is necessary to warrant imposition of an exclusionary sanction once a violation has been established.

[20] The fact that the information and circumstances confronting the agents at the time are more fully developed after the fact does not, contrary to petitioners' contention (Br. 23), constitute an impermissible "after-the-fact analysis of the results of police conduct" or "validat[e] [their conduct] by the ultimate results" (Br. 22). Every suppression hearing that fully develops the facts and circumstances of a search and seizure is, in a sense, an after-the-fact analysis.

The cases cited by petitioners deal with the latter question, and we of course do not dispute that once a violation has been shown, the police officers' motives or good faith may be relevant, even controlling in some circumstances, in determining whether to impose an exclusionary sanction. Thus, for example, in *United States* v. *Janis,* 428 U.S. 433, the Court held that the exclusionary rule should not be applied to suppress in a federal civil tax proceeding evidence that had been unconstitutionally seized by state police officers, because, the Court reasoned, "the imposition of the exclusionary rule * * * is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest." 428 U.S. at 458. Thus, in *Janis, Calandra,* and similar cases the Court has recognized that, in view of the deterrent purposes of the exclusionary rule, consideration of official motives may militate against the application of the exclusionary rule even though a constitutional violation has been established. This is a far cry from petitioners' contention that improper official motives alone can establish the violation in the first instance and can render otherwise lawful conduct unlawful, and we know of no decision of this Court holding or even intimating the correctness of such a proposition.[21]

[21] Several decisions upholding the interception of communications have made reference to the agents' "good faith" efforts to minimize as one of the reasons supporting the lawfulness of the interceptions. See, *e.g., United States* v. *Hinton,* 543 F. 2d 1002, 1012 (C.A. 2), certiorari denied *sub nom. Bates* v. *United States,* 429 U.S. 1066; *United States* v. *Quintana,* 508 F. 2d 867, 875 (C.A.

(Continued)

In short, the court of appeals correctly held that the lawfulness of the interceptions in this case must turn upon an objective assessment of the facts and circumstances confronting the agents at the time.[22]

B. THE RECORD DOES NOT IN ANY EVENT SUPPORT PETITIONERS' ASSUMPTION THAT THE AGENTS SUBJECTIVELY INTENDED TO DISREGARD THE MINIMIZATION REQUIREMENTS OF THE INTECEPTION ORDERS

While, as we have argued above, improper subjective motives do not render unlawful actions that are otherwise objectively reasonable, the record in this case does not in any event support petitioners' assump-

(Continued)
7); *United States* v. *Tortorello*, 480 F. 2d 764, 784 (C.A. 2), certiorari denied, 414 U.S. 866. Whatever the merits of this proposition, there is little basis for inferring from those statements the converse proposition—that absence of "good faith" would render unlawful objectively reasonable interceptions—since that issue was not presented in those cases and since those decisions did not discuss, or apparently consider, the authorities establishing the principle that statutory and constitutional compliance must be judged on the basis of objective criteria. Thus, we take those statements to suggest that good faith is relevant in determining the appropriate suppression remedy, but there must first be a finding of a violation before it is appropriate to consider what should be suppressed.

[22] As the court of appeals recognized (A. 46), "[t]he presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied * * *." If evidence reflects that police officers intended to do something without regard to constitutional or statutory requirements, that fact may be probative in assessing the credibility of the officers' claims that their actions were in fact based on information or other circumstances that would make their actions lawful. Here the assessment of the agents' compliance with the statute was based on an objective analysis of the communications they listened to, and there was therefore no occasion to factor the agents' allegedly improper motives into that assessment.

tion—essentially unsupported by any analysis based on the record—that the agents entertained a subjective intent to act unreasonably or to disregard the minimization requirements of Judge Smith's orders. Indeed, the undisputed testimony in the record supports the contrary conclusion.

As outlined in the Statement (pp. 8–11, 14–15, *supra*), Agent Cooper testified that the agents were aware that the orders "restrict[ed] us to conversation relating to narcotics" and that he "relayed [those] instructions to the agents who would be manning the intercept" (A. 125). Agent Cooper consistently denied that he instructed the agents to monitor all conversations (A. 126; 1974 Tr. 92, 126) and testified that the instructions that he did give specifically directed the agents not to monitor conversations likely to contain privileged communications (A. 126).[23] Moreover, Agent

[23] It is unwarranted to infer that Agent Cooper, by specifically prohibiting any interception of certain types of calls, implicitly instructed the agents to intercept all other calls in full. The privileged calls were mentioned as examples of calls that would not have been subject to interceptions at all. While Agent Cooper testified (A. 126) that "[the agents] were instructed to monitor calls except for those calls which fell into a privileged nature, certain restricted types of calls," that statement must be understood in the context of his testimony as a whole, the thrust of which was that the interception or non-interception of other types of calls would have to depend on the agents' ability to develop patterns among the calls after "monitoring" at least some portion of those calls at the outset of the operation. (See, *e.g.*, 1974 Tr. 94, 96.) In any event, if petitioners are contending that the agents understood Agent Cooper's instructions implicitly to require the total interception of all other calls, it was their burden to call those agents and explore their understanding. *Nardone* v. *United States* 308 U.S. 338, 341; cf. *United States* v. *Crouch*, 528 F. 2d 625 (C.A. 7).

Cooper testified that this intercept was conducted on the same basis as another intercept in which he had previously participated and in which the agents, after developing patterns among the calls, would not intercept calls they had reason to believe would be irrelevant (1971 Tr. 410–414).

The district court's conclusion that there was an "admitted knowing and purposeful failure by the monitoring agents to comply with the minimization order" (A. 39) appears to be based on three underlying facts or conclusions, none of which, individually or collectively, sustains the conclusion:

1. Finding No. 4 (A. 36) states that the agents listened to and recorded all calls. This is correct, but, standing alone, it is insufficient to sustain the conclusion that the agents made no attempt to meet their obligation to minimize, as petitioners themselves have recognized.[24] If a man drives to work without encountering, and therefore without stopping at a red light, it would be a non-sequitor to conclude from this fact that he entertained no intent to stop at red lights. The district court's conclusion is similarly a non-sequitor, unless bolstered by independent evidence of intent.

2. Finding No. 10 (A. 37) sets forth certain testimony of Agent Cooper as constituting an admission that the agents purposefully disregarded the minimization requirement. The testimony quoted in the finding involves an affirmative response to the following

[24] See Petitioners' Reply to the United States Brief in Opposition to Certiorari, p. 1.

question from the court: "Do I understand from you then that the only time that you considered minimization was when you found that you had been connected with a wrong number?" While this testimony, taken out of context, might appear to support the court's conclusion, it is quite apparent when the testimony is considered in context that Agent Cooper meant by his answer simply that this was the only occasion that conversations were not in fact intercepted, not that the agents never otherwise gave consideration to the minimization reqirement of the order.[25]

3. Finding No. 9 (A. 36) recites the fact that the reports periodically submitted to Judge Smith during the course of the interception classified 40 percent of the intercepted calls as narcotics related and 60 percent as not being narcotics related. It is assumed by petitioners from this fact that the agents recognized at the time that they were intercepting a large number of calls that should not have been overheard under the minimization requirement. In fact, Agent Cooper testified that the figures were intended to reflect the proportion of calls that were clearly narcotics related, but that he had not meant to classify the remainder as clearly not related to the offense under investigation (1974 Tr.

[25] The confusion about the colloquy between the district court and Agent Cooper may derive from the ambiguity of the court's questioning. The court consistently used the term "minimization" as a synonym for non-interception (see 1974 Tr. 680, 681, 685; see also 1974 Tr. 98), although the concepts are in fact quite different.

100–104). Rather, he viewed most of the other calls to be ambiguous (*ibid.*).[26]

The record affords no basis for concluding that the agents proceeded in bad faith in this case, that is, with the intent to ignore the legal duty that they understood to be imposed on them by the minimization requirement. At worst, their understanding of the legal standards for administering the minimization requirement may have been different from the criteria ultimately established by the courts (*i.e.*, they may have made "no attempt to comply" with minimization requirements not articulated with particularity in the intercept order or yet enunciated by the courts). Thus, even if the record could be read to support the conclusion that the agents would have intercepted conversations of a kind that this Court concludes should not have been intercepted—and we believe the record would not support such speculation—it would not indicate "bad faith" on the part of the agents.

In sum, even if subjective intent were thought to be relevant to the issue of the agents' compliance with the minimization provision of the intercept orders, the record provides no basis for concluding that their intent was improper.[27] See also *United States* v.

[26] In such instances, even though it may retrospectively appear that interception of the call was not necessary, this could not have been known to the agents contemporaneously with the interception, and accordingly the fact of interception does not evidence any purpose to ignore the minimization requirement.

[27] Petitioners err in contending (Br. 27) that the district court's findings should not have been overturned by the court of appeals because they were not "clearly erroneous." See Fed. R. Civ. P. 52. If petitioners' contention relates to any conclusions concerning the agents' subjective intent, the record on that issue is undisputed. Petitioners do not deny Agent Cooper's testimony, and the district court's conclusions are not based upon determinations of credibility or on choices between conflicting testimony. The only question is the permissible inference to be drawn from the undisputed facts, and that is a question of law.

Chavez, 533 F. 2d 491 (C.A. 9), certiorari denied, 426 U.S. 911, finding good faith compliance with minimization requirements on a similar record.

C. THE INTERCEPTIONS IN THIS CASE WERE REASONABLE AND COMPLIED WITH THE MINIMIZATION REQUIREMENTS OF THE INTERCEPTION ORDERS

As we noted at the outset (p. 23, *supra*), petitioners point to no particular conversation or group of conversations that could not reasonably have been intercepted in their entirety. Rather, they contend that the interceptions violated Judge Smith's order because the agents allegedly harbored an unlawful intent to intercept without regard to the minimization requirement. Nevertheless, petitioners also assert that the court of appeals' "acceptance of [the] retrospective statistical analysis could not support its result for several other reasons" (Br. 25). We now turn to a consideration of this argument.

The first reason assigned for petitioners' claim is the completely incorrect assertion that "the district court found that the call analysis contained errors of characterization and factual inaccuracies and did not represent information known to the agents at the time of interception" (Br. 25–26). No citation is given for that statement, and the district court made no such

findings (see A. 35–39).[28] Second, petitioners appear to contend (Br. 26–29) that the interceptions as a whole were unreasonable because the courts of appeals have identified a number of general factors to be considered in assessing the reasonableness of interceptions, which, applied to this case, allegedly demonstrate the unreasonableness of these interceptions. However, as the cases cited by petitioner (Br. 26) indicate, those factors (*e.g.*, the character and scope of the criminal enterprise, and the degree of judicial supervision) are to be utilized in connection with particularized assessment of the interceptions themselves. They cannot be applied in a vacuum, and petitioners' failure to discuss the intercepted calls themselves renders their analysis meaningless.[29]

Nevertheless, because petitioners' arguments could be read as also challenging the objective reasonable-

[28] Not even Finding No. 12a (A. 38) could arguably support petitioners' statement. That finding states: "The 'call analysis' conflicts with the reports and characterizations of the intercepted calls as made and determined by the monitoring agents whose conduct is controlling in this case." The finding reflects only the district court's view that the call analysis' characterizations differed from the agents' characterizations of the calls; it does not suggest any conclusion that the call analysis was factually erroneous or relied on information not known to the agents at the time.

[29] Under the analysis employed by most courts, the interception of a particular call might be reasonable if, for example, the criminal enterprise was a large one or if the agents had reason to believe the parties to the call to be criminally involved, whereas interception of the same call might not be reasonable if the criminal enterprise were a one-man operation or if the agents had no reason to believe the parties to the conversation were implicated in the offense. But the analysis has to begin with a consideration of the communication itself.

ness of the interceptions, we shall briefly identify the considerations supporting the court of appeals' conclusion that the interceptions in this case were objectively reasonable.

We begin by noting that the situation of an agent monitoring telephone conversations pursuant to a judicial authorization is analogous to that of an officer searching a house pursuant to a search warrant. The conventional equivalent to the minimization requirement is the obligation of a searching officer—which may arise from explicit restrictions in the warrant or be inferred from the reasonableness requirement of the Fourth Amendment itself—to confine the search to those areas where it may reasonably be expected that the items identified in the warrant might be found. The officer may not, for instance, search desk drawers for a stolen television set. On the other hand, the officer may search any room of the house where the television set could be, without having probable cause to believe that it is in any particular room.

Similarly, in applying the minimization requirement, the officers may listen to any conversation that they reasonably believe could relate to the offenses under investigation, without having probable cause at the outset to believe that a particular conversation will in fact evidence the crime. If, on the other hand, it becomes clear that a particular conversation will not relate to the offense, the interception of that conversation should be terminated. It is difficult to lay down hard and fast general rules to implement these principles, however, since the proper approach in any par-

ticular investigation will depend upon a number of variables.

As a general matter, as the court below noted (A. 44), the very nature of an intercept operation requires monitoring agents to listen to some portion of every call in order at least to determine the identity of the parties to it. How much of the call they should reasonably listen to depends on a large number of factors, many of which can only be applied after the agents have developed patterns among the calls.[30] A call between two persons known to the agents to be wholly ignorant of the subject of the investigation should, of course, ordinarily not be intercepted as soon as the agents determine the identity of the callers. Conversely, where one or both parties to the call are known participants in the criminal enterprise, it ordinarily would be reasonable to listen to the entire conversation or at least a significant portion of it. It is impossible to develop any formula that can be applied in advance. In this case, we submit that a number of factors demonstrate the reasonableness of the interceptions.

1. From the outset, the agents had reason to believe, as the affidavits in support of the authorization applications reflect (A. 89–94), that the target telephone was being used in a large narcotics operation. What the agents learned during the course of the interceptions confirmed that belief; indeed, as Agent Cooper testified, they discovered that the operation involved many more people than they had originally suspected

[30] See *e.g.*, *United States* v. *Quintana*, *supra*, 508 F. 2d at 874.

(A. 165). As the courts have generally recognized, the size of the criminal enterprise is a factor supporting greater leeway in conducting interceptions. See, *e.g.*, *United States* v. *James*, *supra*, 494 F. 2d at 1019–1020; *United States* v. *Cox*, 462 F. 2d 1293 (C.A. 8), certiorari denied, 417 U.S. 918.[31]

2. The transcripts of the intercepted conversations reveal that either petitioner Thurmon or Geneva Jenkins was a party to every intercepted call. Thurmon was a principal target of the interceptions, and the transcripts of the calls reveal that Jenkins' participation became apparent during the first few days of the overhearings (A. 150; I Tr. 131–132). Accordingly, it was not unreasonable for the monitoring agents, after identifying one of the parties to each conversation as a participant in the conspiracy, to continuing listening for at least some period of time with the expectation that the conversation might shed light on the criminal investigation.

3. As Agent Cooper testified (1971 Tr. 309; 1974 Tr. 100) and as the analysis of the calls established (A. 145–147), many of the conversations used coded language or were otherwise ambiguous, and their subject matter could not therefore be readily determined by the monitoring agent. Thus, as Agent Cooper also testified (1974 Tr. 100–104), the fact that the agents, reporting to Judge Smith through Assist-

[31] The fact, relied on by petitioners (Br. 27), that the conspiracy turned out to involve local distribution of narcotics rather than out-of-state importation as originally thought has no bearing on the size of the operation that the intercepts gradually revealed. And unlike the size of an operation, its geographical scope has little direct bearing on minimization obligations.

ant United States Attorney Sullivan, described 40 percent of the intercepted calls as narcotics related did not mean that they recognized the other calls as clearly unrelated to the criminal enterprise; in fact, some of them may have been related even though it is not possible to determine the fact reliably.

4. Many calls were of extremely short duration, consisting, for example, of wrong number calls, calls in which the person called was not at home, or calls to obtain recorded time and weather information (A. 47, n. 15; A. 145).[32] With respect to the interception of recorded messages providing information available to the public at large, the monitoring agents had no reason to believe that their interceptions would invade anyone's privacy interest, which was clearly the concern of the minimization requirements of the statute and Judge Smith's orders.[33] With respect to the other calls, the agents had no way of determining whether or not the call would be relevant until the call was over.

5. As the court of appeals noted (A. 48), the only calls that have been identified "as potentially subject

[32] The government's call analysis does not break down the calls on the basis of their duration, but examination of the transcripts reveals that many were extremely short.

[33] Since the only information gained from the interception of such a call is the fact and the time of the call, and since that information could be as readily gained from the use of a pen register device alone, it may be doubted whether such an interception falls within the statutory definition of "interception" at all. See S. Rep. 1097, *supra*, at 90.

to a minimization requirement" were seven calls between Geneva Jenkins and her mother. While those calls ultimately proved to be unrelated to the conspiracy, the testimony of Agent Cooper (1974 Tr. 87–89), the government's call analysis (A. 149–153), and the court of appeals' own independent analysis (A. 48–49) abundantly demonstrate that the agents had reasonable grounds to believe that Jenkins' mother knew about the conspiracy and that certain portions of the conversations alluded to it. Petitioner do not challenge those conclusions.

6. Finally, the facts of this case reflect that the agents here were under reasonably close judicial supervision. They submitted reports of their progress every five days to Judge Smith indicating the total number of calls intercepted and the number of those that they positively identified as narcotics related. While that fact alone does not establish the reasonableness of their conduct, it minimized the risk, which the mechanisms of Title III were enacted to prevent, of significant invasions of privacy that might otherwise have resulted from interceptions conducted without the restraining influence of such judicial oversight. See *United States* v. *James, supra,* 494 F. 2d at 1021; *United States* v. *Bynum,* 485 F. 2d 490, 501 (C.A. 2), vacated on other grounds, 417 U.S. 903; *United States* v. *Cox, supra,* 462 F. 2d at 1301.

II

ASSUMING *ARGUENDO* THAT THE AGENTS IN THIS CASE VIOLATED THE MINIMIZATION REQUIREMENTS OF THE INTERCEPTION ORDERS BY INTERCEPTING SOME CONVERSATIONS THAT COULD NOT HAVE BEEN REASONABLY INTERCEPTED, 18 U.S.C. 2518(10) DOES NOT REQUIRE THE SUPPRESSION OF ALL INTERCEPTED CONVERSATIONS

We have argued in Part I, *supra*, that the agents in this case complied with the minimization requirements of Judge Smith's orders. If the Court disagrees with our contention, it would be presented with two additional questions: first, whether Section 2518(10)(a) requires the suppression of all intercepted communications or only those communications that were not properly intercepted; and second, the standing of petitioner Scott to challenge the use of the interceptions against him. We discuss the first question in this Part and the second question in Part III, *infra*.

If petitioners' position—that the alleged improper subjective motives of the agents rendered unlawful their interceptions of all conversations, regardless of the content of any conversation—were accepted, it would follow that every conversation, even those directly concerned with the conspiracy to distribute narcotics, was improperly intercepted and that any party to a conversation would have standing to require its suppression. We assume for the sake of the discussion here that this extreme position is not accepted, and further assume (contrary to our argument above and the court of appeals' conclusion) that we are dealing with a case where some communications were intercepted in violation of the minimization requirements and others were not. In that situation, we submit that under the statute and prevailing case law only those communications that should not have been intercepted are required to be suppressed.

Our contention is supported by the terms of Section 2518(10)(a). That provision states in pertinent part that "[a]ny aggrieved person * * * may move to suppress the contents of *any* intercepted * * * communication * * * on the grounds that * * * (iii) *the* interception was not made in conformity with the order of authorization or approval" (emphasis supplied). If a particular communication was intercepted in conformity with the authorization order, a natural reading of the statute clearly suggests that it is not subject to suppression.[34]

Most of the cases considering the issue have agreed that the statute does not require the suppression of those communications that were properly intercepted.[35] The cases cited by petitioners (Br. 31–32) for a contrary position either found that there was no violation of the minimization requirement, in which event there was no occasion to rule on the scope of the sup-

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[34] It would strain the statute considerably to read it, as petitioners do (Br. 32), to require the suppression of *all* intercepted communications on the grounds that *any* (even one) of those communications was intercepted in violation of the order. The statute clearly intended to relate the communications to be suppressed to the communications improperly intercepted, as further confirmed by subsection (a)(i) of Section 2518(10), which authorizes suppression on the ground that "*the* communication was unlawfully intercepted" (emphasis supplied).

[35] *United States* v. *Cox*, 462 F. 2d 1293, 1301–1302 (C.A. 8), certiorari denied, 417 U.S. 918; *United States* v. *Sisca*, 361 F.

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pression remedy,[36] or held that all the communications were intercepted in violation of the authorizing order.[37]

The proposition that Section 2518(10)(a) does not require the suppression of conversations that were properly intercepted is consistent with the general exclusionary rule principle that suppression is required only of evidence that is obtained as a result of unlawful conduct—that is, evidence that is the fruit

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Supp. 735, 746–747 (S.D. N.Y.), affirmed, 503 F. 2d 1337 (C.A. 2); *United States* v. *Mainello*, 345 F. Supp. 863, 874–877 (E.D. N.Y.); *United States* v. *King*, 335 F. Supp. 523, 543–545 (S.D. Cal.), reversed on other grounds, 478 F. 2d 494 (C.A. 9), certiorari denied, 417 U.S. 920; *United States* v. *LaGorga*, 336 F. Supp. 190 (W.D. Pa.).

[36] *United States* v. *Scully*, 546 F. 2d 255, 262 (C.A. 9); *United States* v. *Turner*, 528 F. 2d 143, 156 (C.A. 9); *United States* v. *Focarile*, 340 F. Supp. 1033, 1047 (D. Md.), affirmed *sub nom. United States* v. *Giordano*, 469 F. 2d 522 (C.A. 4), affirmed, 416 U.S. 505; *United States* v. *Leta*, 332 F. Supp. 1357 (M.D. Pa.), reversed on other grounds *sub nom. United States* v. *Ceraso*, 467 F. 2d 647 (C.A. 3).

[37] *United States* v. *George*, 465 F. 2d 772 (C.A. 6). In that case the monitoring agents testified that they had been instructed to intercept every call and that, accordingly, whenever a call was made "we would automatically turn the machine on." 465 F. 2d at 774. In those circumstances, the court concluded that all interceptions were in violation of the authorizing order and should be suppressed. That conclusion is not inconsistent with our contention in Part I, *supra*, that the reasonableness of the agents conduct depends on an objective assessment of the facts and circumstances known to them at the time. Unless the agents have some reason to believe that every call will be relevant, the use of procedures entailing the automatic interception of every conversation by a machine would preclude a finding that the decision to intercept the entire conversation was based on any facts and circumstances known to the agents at the time. In this case it is undisputed that the interceptions were the product of human decisions made with knowledge of the operative facts—the content and circumstances of

of the illegality.[38] We know of no case holding that the unlawful seizure of evidence requires the suppression of evidence lawfully seized, and several cases have expressly recognized that evidence that is seized beyond the scope of a warrant does not require suppression of evidence seized within its scope. *United States* v. *Dzialak*, 441 F. 2d 212, 216–217 (C.A. 2), certiorari denied, 404 U.S. 883; *Brooks* v. *United States*, 416 F. 2d 1044, 1050 (C.A. 5), certiorari denied *sub nom. Nipp* v. *United States*, 400 U.S. 840; cf. *Stanley* v. *Georgia*, 394 U.S. 557, 570–571 (Stewart J., concurring); *Marron* v. *United States*, 275 U.S. 192. *Sabbath* v. *United States*, 391 U.S. 585, and *Kremens* v. *United States*, 353 U.S. 346, relied on by

the conversations being overheard—that objectively justified the continuation of the interception.

[38] This Court has applied the traditional fruits analysis to several decisions involving interceptions under Title III. Thus in *United States* v. *Donovan*, 429 U.S. 413, in which the application for a judicial authorization failed to identify persons likely to be overheard as required by 18 U.S.C. 2518(1)(b)(iv), the Court held that the statutory violation did not require suppression of the communications intercepted pursuant to the authorization because it was most unlikely that the omission had any effect on the issuance of the order. 429 U.S. at 436. See also *United States* v. *Chavez*, 416 U.S. 562, 574–575; cf. *United States* v. *Giordano*, 416 U.S. 505, 527–528.

In the context of the minimization requirement, the proposition that the improper interception of some communications requires, under the statute, the suppression of properly intercepted communications as well, would lead to the unreasonable result, plainly not contemplated by Congress, that if five out of a thousand communications were unreasonably intercepted, the statute would require the suppression of the 995 that were reasonably intercepted. It is not clear whether petitioners contend for that result. See Br. 33.

petitioners (Br. 32), are not to the contrary; they hold only that where a seizure of evidence is the *result* of some unlawful conduct, it must be suppressed.

We can see no principled basis for applying a different rule to interceptions conducted under Title III. Petitioners argue (Br. 31) that "[s]uppression of only non-pertinent calls could have little, if any, deterrent value. * * * The Government would have nothing to lose and everything to gain in condoning general searches of this nature."[39] While this argument has some superficial plausibility, we submit that it does not withstand analysis. In the first place, the same argument might be made with respect to overbroad conventional searches. If officers arrest an individual and search both within and beyond the area in which a search incident to arrest is permitted, the rule is that items found in the legitimate search-incident area will not be suppressed, although there is thus no disincentive (supplied by the exclusionary rule) to a search of the arrested individual's entire house. The exclusionary rule simply is not administered in such circumstances to extract every ounce of deterrence possible.

Moreover, the exclusionary rule is viewed principally as a means of curbing official excess in pursuit of evidence of crime. To the extent that the minimization requirement is ignored by monitoring agents in

[39] While the government arguably would have little to lose, it is difficult for us to divine what it could possibly have to gain by condoning minimization violations.

the hope that some evidence of crime might unexpectedly be disclosed even from conversations that, objectively viewed, could not reasonably be expected to relate to the investigation, the prospect of suppression would afford a meaningful deterrent. To the extent that the violations of the minimization requirement reflect undisciplined curiosity on the part of the monitoring agents, other statutory remedies are better designed to deal with the problem. Title III contains significant criminal and civil sanctions for violation of its provisions, as well as mechanisms for effectuating those sanctions. 18 U.S.C. 2511(1) makes it a criminal offense, punishable by up to five years' imprisonment, to intercept communications "[e]xcept as otherwise specifically provided in this chapter." In addition Section 2520 affords to any person whose communication was "intercepted * * * in violation of this chapter" a cause of action against any person intercepting the communication, and provides for liquidated damages of not less than $100 per day for each day of violation, punitive damages, and attorney's fees and other litigation costs. While the provision states that "[a] good faith reliance on a court order * * * shall constitute a complete defense to any civil or criminal action * * *," that defense presumably would not be available to agents who act in deliberate defiance of the minimization requirements set forth in authorizing orders.[40] See

[40] Petitioners have never contended that any of the evidence upon which they were convicted derived from intercepted communications that could not, at least objectively viewed, have been properly intercepted; and we submit that the record clearly demonstrates that all of the communications used as evidence were clearly crimi-

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Note, *Minimization: In Search of Standards*, 8 Suffolk L. Rev. 60, 79–80 (1973).

III

PETITIONER SCOTT HAS NO STANDING TO CHALLENGE THE USE AGAINST HIM OF ANY CONVERSATIONS ON THE GROUND THAT THE AGENTS VIOLATED MINIMIZATION REQUIREMENTS WHEN THEY INTERCEPTED CONVERSATIONS TO WHICH HE WAS NOT A PARTY

Throughout this litigation the government has contended that petitioner Scott has no standing to claim that the agents violated the minimization requirements of Judge Smith's orders. The government's contention was based on the position that all of the conversations to which Scott was a party were clearly related to the conspiracy and were reasonable intercepted, and that the only alleged failures to minimize related to conversations to which Scott was not a party, *e.g.*, the conversations between Geneva Jenkins and her mother.

Petitioner Scott, while never contending that he was a party to innocent conversations that could not reasonably have been overheard, has contended that he has standing as a matter of law because some of his conversations were intercepted, relying (Br. 34–36) on the definition of "aggrieved person" in 18 U.S.C. 2510(11) to support that contention. Petitioner Scott's

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nal and interceptable. Accordingly, if the Court disagrees with our contention in Part I that the minimizations requirements were not violated in this case but agrees with our contention that the only communications required to be suppressed are those which were not reasonably intercepted, the judgment below, affirming petitioners' convictions, should be affirmed.

argument fails to distinguish between two different types of standing: "standing" to challenge the use against him of his own intercepted communications on any ground he chooses, and "standing" to assert, as a *basis* for suppressing his own communications, the claim that the agents failed to minimize the interception of communications of other persons and thus improperly invaded the privacy interests of those persons. Petitioner Scott has standing in the former sense, as an "aggrieved person," to complain about the introduction of his own communications on any basis, however unmeritorious. But the nub of the Fourth Amendment standing doctrine, the principles of which also govern Title III cases (see S. Rep. No. 1097, *supra*, at 91, 106; *Alderman* v. *United States*, 394 U.S. 165, 175–176), is that a criminal defendant may not obtain the suppression of evidence against him unless he can show that it was procured by illegal official conduct violating *his* rights. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 230; *Alderman* v. *United States*, *supra*, 394 U.S. at 174; *Simmons* v. *United States*, 390 U.S. 377.

Accordingly, the question of petitioner Scott's standing can only be answered by examining whether any illegality that occurred infringed his rights. Under petitioners' broad theory of the case (discussed in Part I(A) of this brief, *supra*), the monitoring agents' alleged improper subjective intent to violate the minimization requirement of the order casts a blanket taint over the entire interception, rendering the interception of every conversation illegal regard-

less of whether there was any duty to minimize with respect to the particular conversation. If this theory were accepted by the Court, Scott would be entitled to suppression of each of his intercepted conversations, since the interception would *ipso facto* have entailed a violation of his rights.[41]

But if the Court does not accept this approach and agrees with our submission that each interception must be judged on its own facts and circumstances for compliance with the minimization requirements, then petitioner Scott would have no standing to raise the claim of the agents' failure to minimize unless he claimed, and advanced some grounds in support, that the agents' failure to minimize resulted in the improper interception of his own communications. In other words, even if the Court found that some of the communications in this case should not have been intercepted, petitioner Scott's conviction should be affirmed.

This is so because the interest that is protected by the statutory minimization requirement is an individ-

[41] Since Petitioner Scott had no interest in the premises of the target telephone and was not identified as a target of the interceptions in Judge Smith's orders (see A. 79–80, 118–120), he would not have standing to challenge the use against him of intercepted communications to which he was not a party. *Alderman* v. *United States*, *supra*, 394 U.S. at 176–180; *United States* v. *Fury*, 554 F. 2d 522, 525–526 (C.A. 2); *United States* v. *Wright*, 524 F. 2d 1100, 1102 (C.A. 2); *United States* v. *Armocida*, 515 F. 2d 29, 35, n. 1 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, 423 U.S. 858; *United States* v. *Poeta*, 455 F. 2d 117, 122 (C.A. 2); see also A. 30–31, n. 5. Since most of the evidence against Scott set forth in the stipulations consisted of communications (and their fruits) to which Scott was a party, his lack of standing in this respect is not significant.

ual's privacy interest in communications that are not relevant to the subject of the investigation and that could not be reasonably intercepted. Since petitioner Scott has never claimed that the interceptions invaded his interests in that respect,[42] he has no standing to raise, as a basis for suppressing his own communications, any failure to minimize the interception of other communications.

The distinction between different types of standing, while implicit in this Court's Fourth Amendment standing decisions, was most clearly presented and articulated in *United States* v. *Lisk*, 522 F. 2d 228 (C.A. 7), certiorari denied, 423 U.S. 1078. There the defendant sought to suppress the use against him of his own bomb, which was seized after police officers unlawfully searched the trunk of an automobile be-

[42] Although petitioners state (Br. 36, n. 22) that "[i]t is not at all clear that Scott was intercepted only in criminal conversations," Scott has never contended otherwise, and the transcripts of his communications belie any such contention. Accordingly, petitioner Scott has failed to meet his burden (see, *e.g.*, *Simmons* v. *United States*, *supra*, 390 U.S. at 389–394) of establishing his standing to challenge, as a ground for suppressing evidence introduced against him, the legality of conduct that affected none of his statutorily protected rights.

Similar grounds may exist for challenging the standing of petitioner Thurmon, assuming that any failure to minimize that existed did not involve any of his conversations. It is true that, as an occupant of the premises where the target telephone was located and as a named target of the investigation, Thurmon has a broader basis for asserting standing than Scott. Nevertheless, the nature of a minimization violation, tied as it is to the agents' conduct with regard to particular conversations, suggests a remedy framed with reference to the violation. The situation is analogous to one in which agents executing a warrant to search a defendant's house

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longing to the defendant's friend and found the bomb in plain view. In an opinion by Mr. Justice (then Judge) Stevens, the court recognized a distinction between a search and a seizure, and concluded that while the defendant had standing to object to the seizure (since he owned the bomb), he had no standing to object to the search that led to the seizure, since the search invaded none of the defendant's protected interests. In short, the defendant had no standing to raise, as a ground for suppressing the evidentiary use of the bomb, the claim that someone else's privacy rights were unlawfully invaded by the search that brought the bomb into plain view. See also *United States* v. *Scott*, 520 F. 2d 697, 700, n. 1 (C.A. 9), certiorari denied, 423 U.S. 1056. We submit that the analysis was correct and forecloses petitioner Scott from obtaining suppression on the basis of challenging the lawfulness of the interception of conversations to which he was not a party.[43]

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enter without knocking or announcing their purpose, in violation of 18 U.S.C. 3109; in such a case, it would not be the ownership interest in the house that would confer standing to object to the manner of entry, but rather presence on the premises at the time of entry. Since, however, we did not contest petitioner Thurmon's standing in the lower courts, we do not rely on this argument here.

[43] As indicated above (pp. 53–54, *supra*), the standing issue is related to the issue on merits. It is also related to the proper scope of the suppression remedy discussed in Part II of this brief. If the Court agrees with out contention that Section 2518(10)(a) requires only the suppression of communications that should not have been intercepted, petitioner Scott's standing or lack of standing to raise the minimization issue would have no practical significance. His conviction should be affirmed in any event, since he has never contended that his own communications were improperly intercepted. However, if the Court concludes that the improper interception of some communications could require the suppression of all communications, the standing issue would be significant; in that event Scott's lack of standing to raise the issue would nevertheless require affirmance of his conviction, whereas, if he did have standing, his conviction should be reversed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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